

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN**

<p>James E. Peterson</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Fisca Oil Company</p> <p style="text-align: center;">Respondent</p>	<p style="text-align: center;">RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p style="text-align: center;">Case No. 3040</p>
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A complaint of race discrimination in public accommodations by Fisca Oil Company having been filed by James E. Peterson on April 20, 1976; the Madison Equal Opportunities Commission having found probable cause to believe that such discrimination had occurred; and conciliation of the matter having failed; a hearing was held pursuant to notice on August 17, 1977. On that date the hearing was continued to October 26, 1977. On that date testimony was taken and exhibits were introduced from Terry Sumwalt, James Peterson, Sally Dilorenzo and Mark Garfoot.

Appearances:

For Complainant, Jeff Scott Olson
For Respondent, David E. McFarlane

RECOMMENDED FINDINGS OF FACT

The parties stipulated to the following facts which were entered into the record as Joint Exhibit 1.

1. The Complainant, James E. Peterson, is a Black male and, as such, is a member of a protected class under §3.23 of the Madison General Ordinances.
2. The Respondent, Fisca Oil Company, operates a gas station at 2809 West Broadway, Madison, Wisconsin. This station (hereinafter referred to as "the Fisca gas station"). is a place of "public accommodation" as that term is used in §3.23 of the Madison General Ordinances.
3. The Fisca gas station is within the city limits of the City of Madison.
 1. As of April 14, 1976, James Thompson was the Manager of the Fisca gas station and Terry Sumwalt was an employee at the Fisca gas station. As of that date, Thompson, Sumwalt and other employees of the Fisca gas station were Caucasian.
 2. On the evening of April 14, 1976, the Complainant drove his brown 1969 Chevrolet Impala, License No. CA 6827; into the Fisca gas station.
 3. The Complainant ordered \$10.00 worth of gas and Sumwalt began to pump the gas into his car.
 4. The Complainant called to Sumwalt saying: "Hold it, don't put any more gas in."

5. Sumwalt had pumped \$4.65's worth of gas into the Complainant's car. The Complainant told Sumwalt that he must have lost or misplaced his wallet and that he did not have any money to pay for the gas which had been pumped into the car.
6. Sumwalt then told the Complainant that he should leave some item with Sumwalt as security for the Complainant's later return to pay for the gas he had received. The Complainant asked what he should leave, and Sumwalt said, "Do you have a driver's license?" The Complainant said that he did have a driver's license.
7. Sumwalt then said that the Complainant should leave his driver's license with Sumwalt. Sumwalt further stated that when the Complainant came back to pay for the gas he had received, his driver's license would be returned to him. The Complainant agreed to this arrangement and gave his driver's license to Sumwalt. He then drove away from the gas station.
8. After the Complainant had given his driver's license to Sumwalt, Sumwalt took the driver's license into the station. Some time that evening at approximately 10:00 p.m., Sumwalt made the following notation on a blank Fisca Oil Company cash receipt form: "Nigger in brown Impala owe \$4.65 lic. #CA6827." Sumwalt left both the license and the cash receipt form in the office in the gas station.
9. The Complainant returned to the Fisca gas station at about 7:15 p.m. on April 15, 1976. Terry Sumwalt was not on duty and the Complainant dealt with Brian Teegardin. The Complainant told Teegardin who he was and what had happened the night before. Teegardin told the Complainant that he would locate the Complainant's license within the station and return it to the Complainant upon payment of the amount the Complainant owed. Teegardin then went into the gas station.
10. Teegardin could not locate the license and cash receipt form within the gas station so he telephoned James Thompson. When the Complainant saw Teegardin on the telephone, he got out of his car and went inside the gas station. Teegardin took the cash receipt form and tore it in half and threw it into a wastebasket. The Complainant then asked who had written the notation on the cash receipt form and why it had been written. Teegardin said that the attendant who had waited on the Complainant had written the notation and that Teegardin did not know why he had written it. The Complainant told Teegardin that he wanted an apology from Sumwalt for Sumwalt's use of the term "nigger" on the cash receipt form. Teegardin suggested that the Complainant talk to Sumwalt on the telephone, but the Complainant declined saying that he would prefer to talk to Sumwalt face-to-face. The Complainant further stated that he would pay the amount he owed for his gasoline only to Sumwalt and that he would return when Sumwalt was on duty.
11. The Complainant returned the next day when Sumwalt was on duty. The Complainant asked if he could speak to Sumwalt for a moment, and Sumwalt said that he would be willing to speak to the Complainant for a moment. The Complainant then gave Sumwalt the \$4.65, which he owed for the gas he had received on April 14, and asked Sumwalt if he (Sumwalt) realized what he had done. Sumwalt said that he did. The Complainant waited for Sumwalt to volunteer some explanation. Sumwalt gave no explanation. The Complainant then said that he would complain about the matter and that someone would contact Sumwalt about it. Sumwalt asked who would contact him. The Complainant said that he didn't know, but he would see about it.

12. On April 19, 1976, the Complainant registered his complaint concerning the use of the term "nigger" by Sumwalt with the Madison Equal Opportunities Commission.
13. On April 20, 1976, between 5:00 p.m. and 6:00 p.m. the Complainant again stopped for gas at the Fisca gas station. The Complainant was accompanied by a companion, Sally DiLorenzo. When the Complainant drove into the Fisca gas station, it was raining.

The following additional findings of fact are made by the Hearing Examiner.

17. Complainant went to the Fisca station on that date because he believed it to be the closest station to his location when a warning light in his car went on indicating that he was low on gas (Testimony of Peterson).
18. Sally DeLorenzo is or appears to be Caucasian.
19. Rainfall between 5:00 and 6:00 p.m. on April 20, 1976 was 0.14 inches. The temperature at 5:00 p.m. was 49° Fahrenheit. (Respondent's Exhibit #3 given Administrative Notice)
20. At the time Complainant drove his car to the Fisca station in question, Terry Sumwalt and Mark Gargoot were on duty (Testimony of Sumwalt).
21. When Complainant drove up to the gasoline pump on April 20, Sumwalt and Garfoot were inside the station building (Testimony of Peterson and DiLorenzo).
22. Neither Sumwalt nor Garfoot came out of the building to serve Complainant for approximately two (2) minutes (Testimony of Peterson and DiLorenzo).
23. When Mr. Sumwalt did go to Complainant's car he asked Complainant how much gas he wanted (Testimony of Sumwalt).
24. Complainant asked Sumwalt his name (Testimony of Peterson).
25. Sumwalt responded that he would not tell Complainant his name and that he was not going to go through this again (Testimony of Peterson).
26. At the time Complainant had some bills in his hand (Testimony of Sumwalt).
27. Ms. DiLorenzo was counting her money, since she had agreed to pay for the gas (Testimony of Peterson and DiLorenzo).
28. Sumwalt said "I'm giving you ten seconds to order" (Testimony of Peterson).
29. He began to count, reached about four, said "Fuck you" and walked away from Complainant's car (Testimony of DiLorenzo, Peterson, Sumwalt).
30. Peterson said he wanted \$3.00 worth of gas. Sumwalt refused. Peterson then got out of his car and he and Sumwalt shouted at each other. Peterson asking if he was being refused service because he was a "nigger," and Sumwalt replying that Complainant was being refused service because he was an "asshole" (Testimony of Peterson and Sumwalt).

31. Peterson then got back in his car and sat there for about five minutes, while Sumwalt served other customers (Testimony of DiLorenzo, Garfoot, Peterson, Sumwalt).
32. Complainant asked Garfoot to serve him and Garfoot refused, stating that he could only serve customers on one side of the pump, the side opposite Peterson (Testimony of Peterson).
33. Finally Mr. Peterson left (Testimony of Sumwalt).
34. Sumwalt testified that he usually refers to Black persons as "niggers," and understands that term to mean a member of an inferior race.
35. Sumwalt had never refused service to any other customer (Testimony of Sumwalt).
36. Mr. Sumwalt refused to serve Complainant because Sumwalt placed conditions upon Peterson's behavior in order to be served that he did not place on White persons and, to punish Peterson for attempting to peacefully exercise his right to be treated equally.

RECOMMENDED CONCLUSIONS OF LAW

1. Respondent owns a public accommodation within the meaning of Madison General Ordinances §3.23(2)(e) within the City limits of Madison. Therefore, the Commission has jurisdiction over this matter.
2. Madison General Ordinances §3.23(5)(a) prohibits any person "denying to another . . . the full and equal enjoyment of any place of public . . . accommodations . . . because of . . . race . . ."
3. The imposition of stricter conditions of behavior upon persons of one race than those imposed upon persons of another, in order to obtain service, constitutes a denial of full and equal enjoyment of a public accommodation on the basis of race, in violation of Madison General Ordinances §3.23.
4. Denial of full and equal enjoyment of public accommodations as punishment for a peaceful attempt by a person protected by Madison General Ordinances §3.23(5) to assert such rights constitute a violation of that provision.
5. On April 20, 1978, Mr. Terry Sumwalt, Respondent's employee and acting on its behalf, denied service to Complainant, in violation of Madison General Ordinances §3.23(5) as set forth in Conclusion 3 and 4 above.
6. The Madison Equal Opportunities Commission, an administrative agency operating under authority conferred by the Madison Common Council and Wisconsin law, lacks power to order psychological damages, punitive damages, or attorneys' fees for insult, or denial of equal enjoyment of public accommodations, pursuant to Yanta v. Montgomery Ward Co., 66 Wis. 2d 53, 224 N.W. 2d 389, 11 FEP 1169.
7. Remedy appropriate in this matter is an order prohibiting further denial of full and equal enjoyment to Complainant and other Black persons, and prohibiting the use of racially derogatory terms in referring to them.

RECOMMENDED ORDER

Respondent is hereby ordered to cease: (1) any further refusal of service to Complainant; (2) addressing racially derogatory remarks to Black patrons; and (3) refusing to serve Black patrons who object to being so addressed.

Further, Respondent is to provide the Madison Equal Opportunities Commission with written notice that its employees have been so instructed within thirty (30) days of receipt of this order.

Dated at Madison, Wisconsin this 22nd day of August, 1978.

Robert L. Greene, Esq.
Hearing Examiner

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN**

James E. Peterson <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> Fisca Oil Company <p style="text-align: center;">Respondent</p>	MEMORANDUM ACCOMPANYING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 3040
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The essential facts in this case are not disputed. On April 14, 1976, Complainant went in his automobile to the Fisca gas station at 2809 West Broadway in Madison. Mr. Sumwalt began to put gas in his car upon Complainant's request. Subsequently, Complainant learned that he had forgotten his wallet and could not pay for the gas at that time. He left his driver's license with Mr. Sumwalt and promised to return and pay for the gas which had been pumped into his car. Subsequently, he did return and discovered that Mr. Sumwalt had, in a memorandum intended for Mr. Sumwalt and the other employees of the Fisca gas station, referred to him as a "nigger." Mr. Peterson later returned and asked for an apology from Mr. Sumwalt. Sumwalt and Peterson argued and Sumwalt refused to apologize. On April 20, 1976, Mr. Peterson returned to the gas station seeking gas for his car. Mr. Sumwalt approached the car. (There is some dispute about whether Sumwalt stalled before coming to serve Peterson, and whether Peterson stalled in ordering gas.) There was some discussion. Then Mr. Sumwalt made an obscene comment to Complainant and refused him service. Mr. Peterson got out of his car, asked Sumwalt whether he was being refused service because "I'm a nigger?" Mr. Sumwalt then made a further obscene comment to Complainant and continued to refuse him service. Subsequently, Mr. Garfoot, the other employee of Respondent on duty, refused to service Complainant's car.

I

Madison General Ordinances Section 3.23(5)(a) provides in relevant part:

"It shall be an unfair discrimination practice and unlawful and hereby prohibited:

(a) For any person to deny to another, or charge another a higher price than the regular rate for the full and equal enjoyment of any public place of accommodation or amusement because of . . . race . . ."

Clearly Mr. Peterson was denied the "full and equal enjoyment" of Respondent's facilities stipulated to be a public accommodation (Finding of Fact 29 through 32). In addition, Mr. Sumwalt's own testimony indicates that he has racist attitudes toward Black persons (Finding of Fact 34). Respondent argues that Mr. Peterson was in fact denied service on April 20, 1976 because he was an uncooperative customer, making Mr. Sumwalt wait in the rain before ordering gas (Respondent's Initial Brief page 2). And further, Respondent argues that such refusal on the basis of Mr. Peterson's uncooperative attitude is appropriate and permissible under law.

What Mr. Sumwalt's motives in denying service to Complainant on April 20 were, and whether they were permissible, are the major issues.

Having had the opportunity to hear and observe the witnesses testimony, the Examiner believes that Mr. Sumwalt's motivations in refusing service to Complainant were two:

1. Mr. Sumwalt's belief in the inferiority of Blacks. Sumwalt testifies that he knew full well that the term "nigger" denoted an inferior racial group and that it was the term he commonly used to refer to Blacks. He further testified that he had never refused service to any other patrons (no matter how difficult or unruly they may have been). The Examiner finds it incredible that no other patron had ever been more uncooperative than Mr. Peterson was on April 20, 1976, and thus concludes that a different and stricter standard was applied to Complainant's "cooperativeness." In other words, if Peterson had been White, his delay in ordering gas would not have resulted in a refusal of service. To apply stricter requirements to persons of one race constitutes a racial limitation on their enjoyment of the public accommodation, and this is not "equal enjoyment" of it, as required by the Ordinance.
2. Sumwalt refused Peterson service on April 20 as a punishment for Peterson's attempt to exercise his right to be treated equally, and not insultingly or contemptuously in a public accommodation, as required by law.

The source of the difficulties on April 20 between Mr. Peterson and Mr. Sumwalt was clearly a result of Mr. Peterson's objection to being referred to in the way that Sumwalt had. Mr. Sumwalt recognized Mr. Peterson and was reluctant to serve him on the 20th (Finding of Fact 21). His attitude toward Peterson was belligerent (Finding of Fact 25, 28, 29 and 30). Federal public accommodations precedent upholds the right of an individual not to be punished for peaceful attempts to exercise the right to be free of race discrimination in public accommodations. In Hamm vs. City of Rock Hill 379 US 306, 85 S.Ct. 384, 13 L.Ed.2d 301 (1964) the Supreme Court of the United States in interpreting the public accommodations section of the Civil Rights Act of 1964 stated:

"We hold that the convictions must be vacated and the prosecutions dismissed. The Civil Rights Act of 1964 forbids discrimination in places of public accommodations and removes peaceful attempts to be served on an equal basis from the category of punishable activities." Hamm vs. City of Rock Hill at 308

In that case the United States Supreme Court vacated convictions, and abated and ordered dismissal of prosecutions of individuals who had been arrested for sit-ins attempting to desegregate public accommodations. In Offner vs. Shells City, the United States Fifth Circuit Court of Appeals dealt with

private individuals punishing for attempting to be served on an equal basis in a manner that seems pertinent:

"The complaint alleged these facts: Offner is a member of the white race. Shell's owns and operates a department store in Dade County, Florida, and maintains therewith a restaurant principally engaged in selling food for consumption on the premises In August, 1969, Offner joined in a picket line in front of the restaurant to protest racial segregation in the restaurant. On that date and prior thereto, Offner had been a customer of the restaurant. The day following the picketing, Offner was advised he was barred from the restaurant premises. He took the matter up with the manager of the restaurant and the latter countermanded such order. About four years later, the manager died and Offner was again notified he was barred from the restaurant premises. Offner brought the matter to the attention of the new manager and he countermanded such order. The restaurant adopted a policy of integration and for about two years Offner patronized the restaurant and met there with business associates and with his customers. On occasions he took negro associates and customers to the restaurant.

The cashier and other employee personnel of the restaurant were bitterly opposed to integration of the restaurant and its facilities. Because Offner on one occasion had lunch at the restaurant with a former president of the N.A.A.C.P. and on other occasions brought his negro friends and customers into the restaurant, such employee personnel believed Offner had instigated the efforts in 1960 to integrate the restaurant and open its services and facilities to members of the negro race.

"On November 27, 1965, Offner was threatened with being barred from the restaurant. He was allowed in the restaurant, but he was not served with food. Upon inquiry, he learned that the former manager had been succeeded by a new manager. The latter refused to countermand the order refusing service to Offner. He made several attempts, the last on December 4, 1965, to get the order countermanded, but failed and was threatened with arrest for disorderly conduct by the manager. On December 4, 1965, he and his wife entered the restaurant and the manager again threatened him with arrest.

"This suit was commenced on December 20, 1965.

"The gist of the complaint is set forth in paragraph 12 thereof, which reads:

'That the plaintiff (Offner) has been denied the full and equal enjoyment of the goods, a services, facilities, privileges and advantages of a place of public accommodation on the basis of discrimination, based upon plaintiff's assistance to members of the Negro race who had heretofore sought to end discrimination on these premises.'

"The trial court held that the 1964 Civil Rights Act does not provide for relief, unless the complainant has been discriminated against because of his race, color, religion or national origin, hence, the complaint did not state a claim upon which relief could be granted." Offner vs. Shell's City, 376 F.2d 574

"Here taking the allegations in Offner's complaint to be true, Shell's from time to time denied him his right to enjoy the services and facilities of its restaurant, a civil right to which he was clearly entitled, in order to punish him for joining with persons of the negro race in an effort to desegregate the restaurant and open its services to negroes in 1960. Such punishment was private in character. In Tolg (355 F.2d 92) it was public-trial, conviction, and sentence for p. 578 trespass--but the charge against Tolg was invoked by the owner of the restaurant. Section 203 clearly embraces wrongful actions by private persons as well as by the State. It reads: 'No person shall . . . punish or attempt to punish any

person for exercising or attempting to exercise any right or privilege secured by Section 201 and 202.' We hold that the instant case is ruled by the decision of this court in Tolg v. Grimes supra."

It is thus clear under Title II of the Civil Rights Act of 1964, the Public Accommodations Act, that an individual may not be punished either by government or by private individuals for peaceably attempting to be served on an equal basis in public accommodations (see also Robinson v. State of Florida, 345 F.2d 133, Walker v. Georgia, 417 F.2d 5, Rachael v. Georgia, 342 F.2d 346 affirmed, 384 US 780). That Act in Section 203 contains a clear proscription of such punishment. The Madison Equal Opportunities Ordinance does not contain a similar explicit provision.

However, such a prohibition against owners and operators of public accommodations punishing persons otherwise protected against denial of full and equal enjoyment by denial of such enjoyment is implicit in Section 5.¹ A finding that such a provision is not necessarily implied would permit a result clearly contrary to the fundamental intent of the ordinance, as set forth in Section (1). To use an old example; if a Black person should take a seat at a lunch counter, request to be served, and be refused because of his/her race, the refusal would constitute a violation of the Ordinance. However, if that person remained seated and refused to leave until he/she was served, the owner would be within his/her rights to refuse service, since the Black was being "uncooperative, or harassing" the owner.

Such a result is clearly ludicrous, in that it reduces the right of full enjoyment to a nullity for those who would seek to exercise it.

In summary, Respondent contends that Mr. Sumwalt refused service to Peterson because he was being uncooperative. Mr. Sumwalt also testified that he had never refused service to any other customer, Black, White or any, other race. The Examiner finds it incredible that no other customer has ever been more uncooperative than Mr. Peterson was on April 20, 1976. Thus but for Mr. Peterson's race, and Mr. Sumwalt's stated attitudes toward it, Mr. Peterson would not have been denied service. That constitutes a denial of full and equal enjoyment of a public accommodation because of race, a violation of Madison General Ordinances 3.23(5).

Further, Complainant's actions which allegedly constituted his uncooperativeness and harassment of Mr. Sumwalt consisted of a peaceful attempt to exercise his right to equal enjoyment. Respondent's punishment of Complainant by denial of service because of an attempt is also a violation of Madison General Ordinances 3.23(5).

Thus, under either of two theories, Respondent must be found to have violated the Madison Equal Opportunities Ordinance.

II

Complainant requests an award of \$2,500 in compensatory damages, \$5,000 in punitive damages, and reasonable attorneys' fees and costs of litigation.

1. Compensatory and Punitive Damages

"Complainant admits that he "suffered no significant out-of-pocket dollar damages. He suffered no physical injury, no loss of income, no great inconvenience, and was required to pay no money. His injury is nonetheless real and legally cognizable. The Complainant's injury is the humiliation of being treated in a place of public accommodations not as a citizen but as a 'nigger'." (Complainant's Brief, page 14)

Punitive damages are urged in order to serve to deter Respondent and others from engaging in discriminatory behavior, and that failure to make such awards will serve notice on operators of public accommodations that they may discriminate with relative impunity.

It is true that insults such as this may be actionable and that \$5,000, would probably serve as a strong deterrent to discrimination in public accommodations. But the prior question is whether an administrative agency operating under the authority granted by Madison General Ordinances 3.23, and Wisconsin law has the authority to make such awards.

The Commission's authority is only to determine, after full investigation and hearing, whether or not the provisions of Madison General Ordinances 3.23 have been violated, and if so to order actions on the part of respondents necessary to cure the illegal discrimination by compensating the victim and/or taking prescribed action.² By so doing, Respondent may avoid the fine for continuing its-discriminatory actions,³ and/or the fine for failure to comply with the Ordinance from the date that those actions began.⁴ Failure to cure the discrimination makes the respondent liable to have the fines provided by the Ordinance imposed by the State courts upon the Motion of the City Attorney, subject to review by certiorari.⁵

However, the actions and payments ordered by the Commission may not exceed those that could be imposed by Wisconsin courts.

Mr. Peterson suffered no direct or indirect financial injury as a result of Respondent's violation of the Ordinance. Therefore, the Commission is not authorized to award him compensatory damages for psychological injury, or punitive damages, since damages resulting from psychological injuries in the absence of physical ones are not generally recoverable under Wisconsin law.⁶ Nor are such awards of damages provided in cases of public accommodations discrimination arising under Title II of the Civil Rights Act of 1964.

"It is very doubtful however that Kress' violation of Miss Adickes' rights under the public accommodations Title [Title II Civil Rights Act of 1964, 42 USC §2000 a] could properly serve as a basis for recovery under §1983. Congress deliberately provided no damages remedy in the Public Accommodations Act itself, and §207 (b) provides that the injunctive remedy of §206 was the 'exclusive means of enforcing the rights based on this Title.' Moreover, the legislative history makes quite plain that Congress did not intend that violations of the Public Accommodations Title be enforced through the damages provision of §1983." Adickes v. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed. 142 at 150. (1970)

2. Attorneys' Fees

With regard to State law, the situation is much the same for attorneys' fees as it is for compensatory and punitive damages. The Commission lacks explicit legislative authority to award attorneys' fees, and the Wisconsin Supreme Court has held that absent statutory or contractual liability for attorneys' fees, they are not recoverable as an item of damages.⁷ Complainant argues compellingly for the proposition that failure to award attorneys' fees and reasonable costs seriously weakens the public accommodations portion of the Madison Equal Opportunities Ordinance:

"The Wisconsin Supreme Court has strongly stated that the agency charged with the enforcement of the state's anti-discrimination provisions is to steer clear of practices

which 'would have the disastrous affect of encouraging and fostering discrimination, not eliminating it.' Watkins v. ILHR Dept., 69 Wis. 2d 782, 795 (1975). It is clear tat the commission also must strive to avoid such backward movement. Yet this is just what a holding that the Commission is not empowered to award attorneys' fees would accomplish.

"This is true partly because individuals who bear the brunt of discriminatory treatment tend to be without the economic resources necessary to challenge the discrimination that keeps them poor.

"When the economic status of the great bulk of discriminatees is considered along with the length and complexity of the typical case under Equal Opportunity Ordinance, it becomes clear that the Commission has to have the means to encourage the prosecution of meritorious claims to a meaningful conclusion. To the extent that meritorious claims are abandoned for financial reasons, the Ordinance is a failure. Without the prospect of an award of attorneys' fees, cases like the present one, which challenge real and important acts of discrimination, but result in no back-pay award, will almost never be brought, since they will depend either upon the complainant being prosperous enough to retain an attorney, or the private sector being generous enough to provide representation for these individuals. Neither of these conditions is present often enough to have any effect at all on the trend of Equal Opportunity enforcement in the City.

"The long and short of it is that:

'It is only through attorneys' fees provisions that litigants can be assured of the competent counsel they need for the effective enforcement of their right not to be discriminated against.

'Parker v. Matthews, 411 F. Supp. 1059, 1062 (D. C. 1976).

"It is plain that the power to award attorneys' fees is not a luxury which the Commission can afford to do without. Such power is absolutely essential to enable the Department to effectuate the purpose of the Equal Opportunity Ordinance, and as such it is necessarily included with the grant of power."⁸

The Examiner is not insensitive to these arguments. However, for the reasons stated above, it appears that it exceeds the Commission's power to "effectuate the purposes of this ordinance." (Madison General Ordinances 3.23(10)(c)(3)(b)) to award the fees Complainant requests.⁹

III

Thus what remedy remains is for the Commission to issue a finding that Respondent violated Madison General Ordinances 3.23(5) and order the Respondents and its agents to cease and desist from further refusal of service of Mr. Peterson, from referring to Black patrons in racially derogatory terms and refusal of service to those Black patrons who object to being so characterized by Respondent's agents; indeed a hollow remedy.

Dated at Madison, Wisconsin this 22nd day of August, 1978.

Robert L. Greene, Esq.
Hearing Examiner

¹This implicit protection is not necessarily as extensive as that found in §203 of the 7964 Civil Rights Act. It may extend only to persons protesting discrimination against a group of which they are a member, unlike . . . Shells City supra, and it may not cover the actions of law enforcement officials as in Hamm vs. City of Rock Hill supra.

²Madison General Ordinances 3.23(10)(c)(7)(b), Althouse v. Goulette Dane County Court, #2764, December 8, 1976.

³Madison General Ordinances 3.23(13)(b)

⁴Madison General Ordinances 3.23(13)(a)

⁵Wisconsin Constitution Article VII §8, W.S. 68.13(1)

⁶Yanta vs. Montgomery Ward Co., 66 Wis. 2d 53, 224 N.W. 2d 389, 11 FEP 1169, 1173 see also footnote 15 and cases cited therein.

⁷Cedarburg Light and Water Commission v. Glen Falls Ins. Co., 42 Wis. 2d 120, 124, 5, 66 N.W. 2d 165 (1969) Cited in Yanta v. Montgomery Ward Co. supra.

⁸Complainant's Brief, pages 18-20, footnotes omitted.

⁹It is possible that a Wisconsin Court sitting under its jurisdiction to hear suits based on claims arising under United States Civil Rights statutes Terry vs Kolski 78 Wis. 2d 475 (1976) could award attorneys' fees pursuant to to either 42 USC §1988, or 42 USC §2000a. However, the Madison Equal Opportunities Commission. does not have jurisdiction over such actions.